

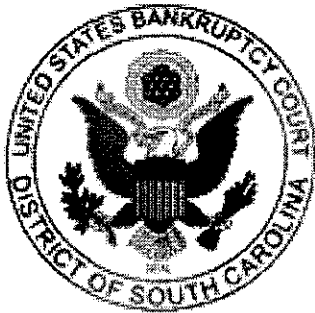
U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 02-01212

Judgment and Order

The relief set forth on the following pages, for a total of 7 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
01/22/2003



Entered: 01/22/2003

John E. Waites

US Bankruptcy Court Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Michael R. Ray,

Debtor.

C/A No. 02-01212-W

ORDER

Chapter 7

THIS MATTER comes before the Court upon the Motion Requesting a Stay of Sale (the "Motion") filed by Michael R. Ray ("Debtor"). On January 7, 2003, the Court entered an order (the "Sales Order") authorizing the Chapter 7 trustee, W. Ryan Hovis ("Trustee"), to sell two lots located in Oakmont Subdivision in Myrtle Beach, South Carolina to Team Six, Inc. for approximately \$48,933.09. Also on January 7, 2003, the Court entered an order (the "Conversion Order") that denied Debtor's motion to convert his bankruptcy case from Chapter 7 to Chapter 13. If Debtor were permitted to convert his case to Chapter 13, he would be given the opportunity to retain the real property that the Court has approved the sale of, and the Trustee would not be able to liquidate these assets. On January 9, 2003, Debtor filed a Notices of Appeal concerning both orders as well as the Motion seeking a stay of the Sales Order pending the appeal of the Conversion Order. The Court originally scheduled a hearing on the Motion for January 17, 2003; however, after receiving Debtor's request for a continuance, it scheduled the hearing for January 22, 2003. Debtor failed to appear at the January 22, 2003 hearing.

Debtor's request for a stay should be considered under Federal Rule of Bankruptcy Procedure 8005.¹ Two Bankruptcy Rules govern the granting of a stay pending appeal, Rule 7062 and Rule 8005.

¹ Further references to the Bankruptcy Code shall be by section number only. Further references to the Federal Rules of Bankruptcy Procedure shall be by Rule number only.

Rule 7062 normally applies only to adversary proceedings or instances where a court has entered a money judgment, and a motion for the approval of the sale of property pursuant to §363 and the motion for conversion are contested matters, not adversary proceedings or proceedings that create money judgments. See Culwell v. Texas Equip. Co., Inc. (In re Texas Equip. Co., Inc.), 283 B.R. 222, 225 (Bankr. N.D. Tex. 2002); Note Buyers, Inc. v. Cooler (In re Cooler), C/A No. 98-02856-W, Adv. Pro. No. 98-80162-W, slip op. at 2 (Bankr. D. S.C. Jun. 30, 1999). Rule 8005, however, applies to contested matters.

Under Rule 8005, the issuance of a stay is left to this Court's discretion, and the standard for granting a stay pending appeal is the same general standard as that applied for the granting of a preliminary injunction. See In re Dunes Hotel Associates, C/A No. 94-75715-W, slip op. at 6 (Bankr. D. S.C. Aug. 1, 1997) (citing Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 811 (4th Cir. 1991)). The proper standard for analysis of a preliminary injunction or a stay pending appeal is as follows: (1) the party requesting a stay pending appeal must make a clear showing that it will suffer irreparable harm if the court denies its request; (2) if the party establishes irreparable harm, the court must balance the likelihood of irreparable harm to the movant from the failure to grant a stay against the likelihood of harm to the opponent from the grant of a stay; (3) if the balance of the harms does not tip decidedly in favor of the movant, a stay should not be granted unless the movant can make a very strong case of probability of success on the merits; and (4) if applicable, the court may evaluate whether the public interest favors granting or denying a stay. See id. at 6-7 (citing Direx Israel, 952 F.2d at 816). The movant bears the burden of establishing that each of these factors supports granting the stay. See id. at 7 (citing Direx Israel, 952 F.2d at 812).

Applying these factors to facts of this case, the Court concludes that it should deny Debtor's Motion as Debtor cannot satisfy the third element of the test, which is demonstrating a probability of success on the merits. As noted in the Conversion Order, Debtor has a heightened burden placed upon him as he is a serial filer. See In re Hartley, 187 B.R. 506 (Bankr. D. S.C. 1995) (holding that debtors who serially file bankruptcy cases bear the burden of demonstrating a change of circumstances to indicate why they are entitled to a further opportunity to reorganize under Chapter 13). In addition, this burden is compounded by the fact that Debtor must prove the appropriateness of a conversion to Chapter 13 after receiving his discharge in Chapter 7. See In re Fisher, C/A No. 00-05354-W, slip op. at 4 (Bankr. D. S.C. Jan. 30, 2002). Further, Debtor seeks to convert his Chapter 7 case voluntarily to allow him to have a Chapter 13 case while this Court's September 24, 2001 Order prohibited Debtor from filing a Chapter 13 case for 180 days. In the Court's view, Debtor cannot meet the demanding burden as Debtor presented no evidence indicating his current employment status or income to demonstrate that he has the ability to fund a Chapter 13 plan, nor did Debtor justify why he should be able to convert his case that was filed during the bar period.² Further, even if the Court accepted Debtor's argument that his right to convert is absolute, conversion in this case would be futile because the Court, based upon the record of this case, would reconvert the case to Chapter 7 sua sponte or upon the Chapter 13 Trustee's motion.³ The facts

² Indeed, to allow a debtor to file a Chapter 7 case before that time period elapses and voluntarily convert it later without any showing of a material change in circumstances or meeting the requirements of Federal Rule of Civil Procedure 60(b) would allow a debtor to circumvent the prior order of this Court. See generally 4 Keith M. Lundin, Chapter 13 Bankruptcy §325-6, n.24 (3d ed. 2002) (citing several cases for the proposition that Chapter 13 eligibility is determined as of the filing of the original Chapter 7 case).

³ Some courts have held that a debtor's ability to convert a case pursuant to §706 is absolute even after that debtor has received a discharge provided the debtor is eligible to participate in

of this case speak for themselves: Debtor has had two previous opportunities to reorganize under Chapter 13, yet both cases were dismissed. The second case was dismissed with a bar to refiling under Chapter 13 for 180 days. Finally, the Court also considers laches as crippling to Debtor's attempt to convert. Debtor seeks conversion after maintaining a Chapter 7 case for approximately one year and on the eve of the sale of his real property. Moving for conversion at this point in the case potentially prejudices the participants who have relied upon Debtor's representations to liquidate his assets and incurred costs and fees accordingly. For these reasons, the Court concludes that Debtor cannot establish a strong probability of a likelihood of success on appeal.

Because Debtor cannot satisfy the standard to obtain a stay pending appeal pursuant to Rule 8005, the Court denies Debtor's motion.

In addition, the Court concludes by noting that, although Debtor did not request to post a supersedeas bond nor demonstrate a willingness to post such a bond pending appeal, Trustee stated at the hearing that the amount of the bond should be at least \$58,000.

AND IT IS SO ORDERED.

the new Chapter to which he or she converts. See In re Widdicombe, 269 B.R. 803, 807 (Bankr. W.D. Ark. 2001). Other courts condition the ability to convert by presuming the right but finding it subject to the Court's determination that the conversion is appropriate. See In re Krishnaya, 263 B.R. 63, 69 (Bankr. S.D. N.Y. 2001); In re Pakuris, 262 B.R. 330, 335 (Bankr. E.D. Pa. 2001); 4 Lundin at §325-9, 10 ("The trend seems to be that the unwaivable right to convert from Chapter 7 to Chapter 13 at any time is conditioned that there has been no misconduct by the debtor during the Chapter 7 case, that the debtor's motives in conversion are consistent with 'good faith,' and that there is no evidence that conversion will abuse creditors or distort the 'bankruptcy process.'"). This Court believes the current trend of considering each motion to convert for its propriety is well-reasoned; accordingly, it considers motions to convert pursuant to §706 after the entry of a discharge on a case-by-case basis. See Fisher at 4.

Columbia, South Carolina,
_____, 2003.

UNITED STATES BANKRUPTCY JUDGE

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FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Michael R. Ray,

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C/A No. 01-01212-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Michael R. Ray's ("Debtor") Motion Requesting a Stay of Sale is denied.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
_____, 2003.